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In the
Supreme Court of the United States

OCTOBER TERM, 1984

STANFORD BARRE' and JOSEPH WOMBLE,

PETITIONERS

versus

THE CIVIL SERVICE COMMISSION
OF THE CITY OF NEW ORLEANS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the district court has taken judicial notice of disputed and irrelevant facts, can the district court proceed to determine whether, as a matter of fact and law, plaintiffs suffered a constitutional deprivation on a motion to dismiss for failure to state a claim?

2. Whether city civil service employees are prohibited from participating in non-candidate elections under Article X, Section 9(C) of the Louisiana Constitution of 1974 and if so, does this prohibition violate the right of free speech guaranteed to these employees under the First Amendment of the United States Constitution and Article 1, Section 7 of the Louisiana Constitution of 1974?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STANFORD BARRE' and JOSEPH WOMBLE,

PETITIONERS

versus

THE CIVIL SERVICE COMMISSION
OF THE CITY OF NEW ORLEANS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Stanford Barre' and Joseph Womble petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals on the rehearing is dated June 14, 1984 (Appendix E). The opinion of the Court of Appeals on the original appeal is dated May 10, 1984 (Appendix D). The opinion of the United States District Court for the Eastern District of Louisiana on

rehearing is dated July 20, 1983 (Appendix C). The opinion of the United States District Court for the Eastern District of Louisiana on the original motion is dated June 22, 1983 (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1984. The Motion for Rehearing to the Court of Appeals was denied on June 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, First Amendment

United States Constitution, Fourteenth Amendment

Title 42 U.S.C. Section 1983

Federal Rules of Evidence, Rule 201

Louisiana Constitution, Article I, Section 7

Louisiana Constitution, Article X Section 9(c)

Home Rule Charter of the City of New Orleans, Section 4-201

STATEMENT OF THE CASE

In early 1983, Stanford Barre' and Joseph Womble, at all times pertinent classified civil service employees of the City of New Orleans, became involved in efforts to

amend and reordain Section 4-201 of the Home Rule Charter of the City of New Orleans. In furtherance of these efforts, Stanford Barre' and Joseph Womble circulated a petition to registered voters of the City of New Orleans, addressed to the seven members of the New Orleans City Council petitioning the City Council to submit to the electors of the City of New Orleans an amendment to Section 4-201 of the Home Rule Charter of the City of New Orleans. (Appendix M).

Section 4-201 of the Home Rule Charter of the City of New Orleans pertains to the term of office of the Mayor of the City of New Orleans and provides that a mayor of the City of New Orleans shall only be allowed to serve two consecutive four year terms. (Appendix L). The amendment sought allows a mayor of the City of New Orleans to seek unlimited four year terms. (Appendix M).

Stanford Barre' and Joseph Womble also affixed two bumper stickers to city vehicles which they operated stating "Dutch (loves) New Orleans," and "New Orleans (loves) Dutch."

On May 3, 1983, the Civil Service Commission issued a directive stating that classified civil service employees were prohibited from "circulating the petition, supporting the proposed charter change and/or soliciting signatures for the petition" because such acts *may* violate the Louisiana Constitution. The directive further stated that it was improper for classified civil service employees to operate a City vehicle "which bears political insignia or political bumper stickers of any kind." (Appendix N). The bumper stickers that had been affixed to the City vehicles by Barre' and Womble were considered by the Civil Service Commission of New Orleans to fall within this prohibition and

would subject Barre' and Womble to disciplinary actions.

Plaintiffs, Barre' and Womble, initiated this action against the Civil Service Commission of New Orleans seeking injunctive relief, damages and attorney's fees on the grounds that the directive issued by the Civil Service Commission violated Article X, Section 9(C) of the Louisiana Constitution, plaintiffs' rights to free speech guaranteed by the First and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Louisiana Constitution and further, said directive deprived plaintiffs of rights and privileges under 42 U.S.C. Section 1983.

On May 19, 1983, a stipulation was entered between the parties that no action or investigation would be taken or initiated by defendant against plaintiffs for the acts stated in the complaint until after a hearing on the injunction.

On May 27, 1983, defendant filed a Motion to Dismiss for failure to state a claim under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

A hearing on the Motion to Dismiss was had on June 22, 1983 before the Honorable George Arceneaux, Jr., District Judge. Judge Arceneaux dismissed plaintiffs' suit. Judge Arceneaux found that plaintiffs had stated a cause of action under Title 42 U.S.C. Section 1983. However, the Court took judicial notice, without notice to the parties, and determined that plaintiffs had not suffered a constitutional deprivation.

Plaintiffs' Motion for Rehearing was denied by the District Court on July 20, 1983. On appeal, the United

States Court of Appeals for the Fifth Circuit affirmed the District Court on May 10, 1984, in a per curiam opinion. Plaintiffs' petition for rehearing was denied by the United States Court of Appeals for the Fifth Circuit on June 14, 1984.

It is petitioners' contentions that the errors in the courts below were the result of facts that were judicially noticed which were irrelevant to the issue before the Court and the result of misinterpretation and misapplication of *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) and *Citizens Against Rent Control v. Berkely,* 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981).

REASONS FOR GRANTING WRIT

I. JUDICIAL NOTICE OF DISPUTED FACTS ARE NOT AUTHORIZED BY FEDERAL RULE OF EVIDENCE 201.

Federal Rule of Evidence 201(b) provides that:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The District Court took judicial notice on the Motion to Dismiss stating:

First of all, not living in a vacuum, the Court, I think, has authority under the Federal Rules of Civil Procedure, Rule 201, to take notice of certain adjudicative facts. Among the facts of which the Court takes notice at this time is that there is presently under way in the City of New Orleans a drive to amend the appropriate section of the City Charter, that is, Section 4-201, to delete that final sentence in order to permit the mayor to succeed himself, or at least to serve more that two full consecutive terms. It would appeal to me that the person most directly affected, based upon judicial notice and the facts that I've related, by this proposal would be the incumbent mayor, Ernest Morial, who bears the nickname Dutch Morial. Therefore, I have to agree with the plaintiffs that the petition and bumper stickers are part and parcel of the same effort.

Now, is this a political effort? First of all, the plaintiffs say that Mr. Morial is not a candidate for political office. That is obvious. He is not because at the present time he cannot be. But the question of when one becomes a candidate is not subject to very complete objective ascertainment. People can become candidates before qualifying opens. Indeed, we have candidates for the office of President of the United States with the election a considerable time away. It seems to me that, under the circumstances of what is going on in the city (sic) of New Orleans at this time, and even if I were not able to take notice of these adjudicative facts, what is set forth in the complaint reflects an effort to delete the prohibition against Mayor Morial succeeding himself, and at the same time to drum up support for this by attaching the respective bumper stickers to various city automobiles. (Appendix A).

The District Court took additional notice on the motion for rehearing stating:

> It requires no quantum leap of logic to conclude that the combined purposes of the bumper stickers and petitions is to clear the way for the incumbent mayor to attempt to succeed himself, by removing the present 'two-term' limitation from the City Charter. While not necessary to the Court's decision, it is neither unreasonable nor far-fetched to conclude that plaintiffs wish to be able to advertise the City's affection for 'Dutch' (and vice versa) while seeking to secure signatures on petitions addressed to incumbent elected City councilmen, exhorting them to call an election to permit the City and its Mayor to reciprocally demonstrate the depths of their respective devotion by authorizing him to seek a third term. (Appendix B).

The judicial notice taken by the District Court was improper. The judicially noticed facts are subject to reasonable dispute because they did not meet the requirements of Federal Rule of Evidence 201(b). Where there are fact questions before a court, judicial notice should not be used unless the facts are common knowledge or can be verified by accurate sources. *Alvary v. United States*, 302 F.2d 790 (2nd Cir. 1962).

Adjudicative facts are those concerning the immediate parties. See: *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976). Mayor Morial is not a party to the proceedings and his motive, intent or any benefits he may derive were not relevant to the issues before the Court.

The District Court obviously considered the Mayor's intent and possible benefit as a critical issue to its

determination. That being the case, the Court should have been reluctant to take judicial notice to determine the issues. *Trans World Airlines, Inc. v. Hughes,* 308 F. Supp. 679 (D.C.N.Y. 1969) *mod. on other grounds,* 449 F.2d 51 (2nd Cir. 1971), *rev. on other grounds,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577, *reh. den.,* 410 U.S. 975, 93 S.Ct. 1434, 35 L.Ed.2d 783, *on remand,* 359 F. Supp. 783. The Court should have been even more reluctant to exercise judicial notice in this case because no testimony was presented by any of the parties.

Though plaintiffs contended on the rehearing of the Motion to Dismiss that the intent of Mayor Morial was irrelevant, a sworn affidavit executed by the Mayor was submitted to the District Court stating that he had not decided to seek another term in office (Appendix P). The District Court obviously chose to ignore said affidavit disputing the judicially noticed facts. The District Court Judge made no mention of the affidavit in the opinion denying the motion for rehearing.

The judicially noticed facts were based on conjecture and were not supported by common knowledge or certain verification. However, the District Court relied on the judicially noticed facts to reach the conclusion that the acts in which plaintiffs engaged and desired to continue constituted political activity reprobated by Article X Section 9(C) of the Louisiana Constitution and that plaintiffs had not suffered constitutional deprivation of their rights.

II. THE OPINION OF THE COURT OF APPEAL AFFIRMING THE RULING OF THE DISTRICT COURT THAT PARTICIPATION IN A NON-CANDIDATE ELECTION IS NOT A CONSTITUTIONAL DEPRIVATION OF CIVIL RIGHTS IS CONTRARY TO THIS COURT'S HOLDINGS IN *LETTER CARRIERS, BELOTTI* AND *CITIZENS AGAINST RENT CONTROL, SUPRA,* AND REQUIRES RESOLUTION BY THIS COURT.

This Court recognized in *Letter Carriers, supra,* that each of the 50 states had passed laws regulating the political activity of employees in the Civil Service.

The Louisiana Constitution prohibits civil service employees from participating in political activity.

> Political activity means an effort to support or oppose the election of a candidate for political office or to support a particular political party in an election. The support of issues involving bonded indebtedness, tax referenda, or constitutional amendments shall not be prohibited. La. Const. Art. X §9(C).

This provision applies to classified civil service employees of the City of New Orleans.

The District Court stated in its opinion of July 20, 1983 that,

> In effect, the petition arguably becomes a "nominating petition" of the nature barred by the *Letter Carriers* rule. (Appendix C).

Letter Carriers, supra, bars the circulation of

nominating petitions for candidates for public office. The petition involved herein pertained to an amendment to the Home Rule Charter.

The District Court is concerned that the efforts to amend the Home Rule Charter had political overtones or were political in nature. Even if that were true, these activities are not political within the definition of Article X, Section 9(C) of the Louisiana Constitution.

There is rarely a constitutional question, bond issue, tax measure, charter change, referenda or municipal ordinance presented to the public that does not have political overtones or is not political in nature. However, the prohibition on political activity does not prohibit political activity on these matters. *Letter Carriers, supra,* at p. 2889.

The District Court stated,

> Further the Court notes that the *activity* excluded from the reprobated sphere of politics is "support of issues." This does not mean, or include, active participation in a signature-seeking petition drive to compel an election to seek voter support for the right for an incumbent mayor to succeed himself. (Appendix C). Emphasis supplied.

Article X, Section 9(C) of the Louisiana Constitution clearly allows plaintiffs to participate in the effort to amend the City Charter. The Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Volume IX, page 2708 contains the following discussion:

> Mr. Jenkins
>
> Suppose the governor told all classified employees to go out and support a two-term

> amendment that would be on the ballot, like we had in what was it, '66. They could go out and campaign on constitutional amendments. Isn't that correct?
>
> Mr. Flory
>
> That's correct. They could campaign any way they want to, Mr. Jenkins, which I think is a basic American right. It's something that affects the basic law of this state. They ought to have a right to...

This Court has consistently noted the difference between candidate and non-candidate elections or issue and non-issue elections in its holdings pertaining to what is or is not permissable prohibited political activity. *Letter Carriers, Bellotti* and *Citizens Against Rent Control, supra.* The Fifth Circuit Court of Appeals has also recognized this distinction in *Let's Help Florida v. McCrary,* 621 F.2d 195 (5th Cir. 1980, *aff'd mem sub nom., Firestone v. Let's Help Florida,* 454 U.S. 1130, 102 S.Ct. 985, 71 L.Ed.2d 284 (1982) and *Wachsman v. City of Dallas,* 704 F.2d 160 (5th Cir. 1983), *writ. den.,* __ U.S. __, 104 S.Ct. 537, 78 L.Ed.2d 717.

This Court stated in *Bellotti, supra,* at p. 1423.

> Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. (Citations omitted.)

In *Citizens Against Rent Control, supra* at p. 439 this Court found

> [T]here is no significant state or public interest in curtailing debate and discussion of a ballot measure.

The District Court found that Article X Section 9(C) of the Louisiana Constitution excepts constitutional amendments not city charter amendments from the definition of political activity. (Appendix C).

Letter Carriers, supra, at p. 2889 recognizes that participation in "referendums, approval of municipal ordinances, and others of a similar character" is not prohibited political activity.

The Civil Service Commission of New Orleans allowed civil service employees to participate in another city charter amendment drive which arose after this case was instituted. (Appendix O). There was an attempt in New Orleans to amend the Home Rule Charter of New Orleans to return the rate-making regulatory authority of a public utility to the City of New Orleans. The City Council was divided on the issue. However, the Commission found that this was not prohibited political activity as long as the issue was not connected to an individual campaign or reelection and had no apparent political overtones.

Prohibited political activity turns on whether the election is a candidate election or issue election. *Bellotti, supra.*

The Louisiana Constitution does not allow the Civil Service Commission the discretion to find participation in issue elections prohibited political activity based on whether political overtones are apparent. This Court found that Congress did not intend the Civil Service Commission

to expand the prohibition of political activity.

> [W]e think it appears plainly enough that Congress intended to deprive the Civil Service Commission of rulemaking power in the sense of exercising a subordinate legislative role in fashioning a more expansive definition of the kind of conduct that would violate the prohibition against taking an active part in political management or political campaigns. *Letter Carriers, supra* at 2893.

To allow permissible political activity in issue elections to turn on the Commission's finding of apparent political overtones, allows the Commission to prohibit civil service employees from participating in any issue election based on the Commission's subjective conclusion. There is no authority under state or federal law for this exercise of power by the Commission.

> Words inevitably contain germs of uncertainty and, as with the Hatch Act, there may be disputes over the meaning of such terms in §818 as "partisan" or "take part in" or "affairs of" political parties. But what was said in *Letter Carriers, supra*, 413 U.S. at 578-579, 93 S.Ct. at 2897, is applicable here: "there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any costs, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with without sacrifice to the public interest. *Broadrick v. Oklahoma*, 413 U.S. 601 at p. 608, 93 S.Ct. 2908 at pp 2913-2914, 37 L.Ed.2d 830 (1973).

A reasonable interpretation of Article X, Section 9(C)

of the Louisiana Constitution is that the provision encompasses amendments to the Home Rule Charter of the City of New Orleans. Any other interpretation is an impermissible restriction of free speech.

Where state and city civil service employees can participate in efforts to amend the organic law, the constitution, of its nation and state, no governmental interests are served by prohibiting city civil servants from participating in efforts to amend the organic law of its city. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

CONCLUSION

For the reasons stated above, Stanford Barre' and Joseph Womble respectfully request this Court to grant its petition in this case for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been served upon:

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this _____ day of September, 1984 by placing same in the United States Postal Service postage prepaid.

_____
Bruce C. Waltzer

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 83-2445
SECTION "K"

STANFORD BARRE' and JOSEPH WOMBLE

Plaintiffs

versus

THE CIVIL SERVICE COMMISSION
OF THE CITY OF NEW ORLEANS

Defendants

OPINION

All right. Let's back up just a second, and let's deal specifically with the issues presented to the Court as I perceive them. The plaintiff complains that the activities which the recent ruling of the New Orleans Civil Service Commission would prohibit are not political activities in the sense of the prohibition in Section 9 of the Louisiana Constitution. As I perceive it, there is no quarrel with the right of the state to reprobate political activities by a classified civil servant. Indeed, this was a right that was not only recognized but actually endorsed by the United States Supreme Court in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, decided in 1973. The court there stated clearly, "Our judgment is that neither the First Amendment nor any other provision of the Constitution in

validates a law barring this kind of partisan political conduct by Federal employees."

Among the activities reprobated there, and indicated on page 2886 of the Supreme Court citation, initiating or circulating a partisan nominating petition, or soliciting votes for a partisan candidate for public office.

The court went forward and noted that all fifty states have restricted the political activities of their own employees, and endorsed the statutes approvingly, noting that it's not only important that the government and its employees in fact avoid practicing political justice, but it's also critical that they appear to the public to be avoiding it if confidence in the system of representative government is not to be eroded to a disastrous extent.

Then came *Wachsman v. City of Dallas* which dealt specifically with what constitutes partisan political activities. In upholding a Dallas ordinance and procedure, the court noted that it wasn't necessary to have political parties as such—and, incidentally, let me say that this is *Wachsman v. The City of Dallas,* 704 F.2d 160, a Fifth Circuit, May 2, 1983 case. The court noted in *Wachsman* that in determining partisan political activities, parties as such, or the existence of parties as such, were not the test, that a non-partisan election such as that contended was being held in Dallas still presented sufficient partisan characteristics to trigger the purpose of the little hatch act provision there at stake.

The Court regards Section 9 of the Louisiana Constitution, then, as being valid, and not only valid but having the concept and philosophy of which has actually sought the approval, and received the approval, of the

United States Supreme Court and the Fifth Circuit at least indirectly. But the real issue is not whether this could be done, but whether the action taken in this particular instance is within the protection of the *Letter Carriers* decision in *Wachsman v. Dallas,* or as to whether it is political activity which is reprobated by the Constitution of Louisiana, or whether it is protected activity, either under the terms of the Constitution itself, or under the First Amendment as free speech.

In this connection the Court has before it the well-pleaded complaint and the attachments thereto, including the bumper sticker, which is red and white, Exhibit E, New Orleans, with a heart, which the Court assumes means loves Dutch, along with another bumper sticker, white background with red printing, Dutch, with a heart—I guess loves New Orleans, and a petition which seeks to amend Section 4-201 of the City Charter to delete the final sentence as the existing provision of the charter is quoted in Article 5 of the plaintiff's complaint. In effect, the result would be to delete the words, "No person who shall have been elected for two full consecutive terms as mayor under this charter shall be eligible to succeed himself."

Now, the Court is confronted with only two questions. First of all, whether or not either one of those bumper stickers may be placed upon city vehicles in which city employees are riding, and, secondly, whether or not-and when I say city employees, I'm talking about classified city civil service employees—and whether or not these classified civil service employees should be permitted to solicit signatures on the petition.

There is no quarrel, as I appreciate it, that under no circumstances could a city employee be prohibited from

signing such a petition. The thrust of the complaint is directed towards Civil Service Commission rulings which would prohibit riding by classified civil service employees in city automobiles which bear the bumper sticker, and at city employees circulating—and, again, when I use the words, "city employees," I mean the classified city employees—circulating the petition supporting the proposed charter change.

This Court, first of all, doesn't live in a vacuum; and, secondly, has been advised by counsel for the plaintiffs that the bumper stickers and the petition are related to one another and tied together. This being so, it would seem to me, then, that my ruling as to one would have to be applicable to the other, or in any event, then, in ruling on both I would have to look at both of these items together, and I do so.

First of all, not living in a vacuum, the Court, I think, has authority under the Federal Rules of Civil Procedure, Rule 201, to take notice of certain adjudicative facts. Among the facts of which the Court takes notice at this time is that there is presently under way in the City of New Orleans a drive to amend the appropriate section of the City Charter, that is, Section 4-201, to delete that final sentence in order to permit the mayor to succeed himself, or at least to serve more that two full consecutive terms. It would appeal to me that the person most directly affected, based upon judicial notice and the facts that I've related, by this proposal would be the incumbent mayor, Ernest Morial, who bears the nickname Dutch Morial. Therefore, I have to agree with the plaintiffs that the petition and bumper stickers are part and parcel of the same effort.

Now, is this a political effort? First of all, the plaintiffs say that Mr. Morial is not a candidate for political office. That is obvious. He is not because at the present time he cannot be. But the question of when one becomes a candidate is not subject to very complete objective ascertainment. People can become candidates before qualifying opens. Indeed, we have candidates for the office of President of the United States with the election a considerable time away. It seems to me that, under the circumstances of what is going on in the city of New Orleans at this time, and even if I were not able to take notice of these adjudicative facts, what is set forth in the complaint reflects an effort to delete the prohibition against Mayor Morial succeeding himself, and at the same time to drum up support for this by attaching the respective bumper stickers to various city automobiles.

The Court regards these as being within the terms of *Wachsman v. City of Dallas* termed as being the purpose of a little hatch act, that is, to keep the employee from being involved in the politics that elect his boss. To say that these efforts are non-political is disingenuous. To claim that they bear no political overtones is patently ridiculous. The prohibitions are designed to cover just such things as these where citizens employed in public office are called upon to bear a laboring oar in an effort designed to make it possible for an incumbent mayor to succeed himself. Someone put in the position of having to carry this petition, or being requested to sign it, is being requested to become involved in the politics that selects his boss. This is precisely what the Supreme Court found justified a little hatch act, and the kind of thing which a little hatch act such as this is designed to prohibit.

Change the language in *U.S. Civil Service Commission v. Letter Carriers*, and it fits particularly well here. A major thesis is that to serve this great end of government, the impartial execution of the laws, it's essential that employees not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets.

As the Court has previously noted, one of the things that was reprobated specifically in *Letter Carriers* was initiating or circulating a partisan nominating petition. If this isn't a partisan, as defined in *Wachsman v. City of Dallas*, nominating, in the sense of making it possible for a mayor to succeed himself where presently he cannot, petition, the Court doesn't believe that one exists.

The Court therefore finds that, as noted by counsel for the plaintiff, these items related to the drive, and tied together, constitute political activity within the definitions and intentions and provisions of Section 9 of the Louisiana Constitution. Under the circumstances, the motion to dismiss will be granted. Thank you, counsel.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 83-2445
SECTION "K"

STANFORD BARRE' and JOSEPH WOMBLE

Plaintiffs

versus

THE CIVIL SERVICE COMMISSION
OF THE CITY OF NEW ORLEANS

Defendants

JUDGMENT

IT IS ORDERED, ADJUDGED and DECREED that there be judgment herein in favor of the defendant Civil Service Commission of the City of New Orleans, and against plaintiffs Stanford Barre' and Joseph Womble, dismissing the plaintiffs' complaint with prejudice.

New Orleans, Louisiana, this 28th day of July, 1983.

UNITED STATES DISTRICT JUDGE

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 83-2445
SECTION "K"

STANFORD BARRE' and JOSEPH WOMBLE

Plaintiffs

versus

THE CIVIL SERVICE COMMISSION
OF THE CITY OF NEW ORLEANS

Defendants

OPINION

Plaintiffs seek reconsideration of this Court's dismissal of their complaint against the New Orleans Civil Service Commission. Plaintiffs' suit alleged that the Commission violated their First Amendment rights by prohibiting them, as members of the New Orleans classified Civil Service, from operating City vehicles on which certain bumper stickers were placed and soliciting signatures on a petition to amend the New Orleans City Charter.

Specimens of the two bumper stickers involved were attached to plaintiffs' complaint. They bear the legends "New Orleans [Loves, symbolized by a heart-shaped figure] Dutch" and "Dutch [Loves, symbolized by a heart-shaped figure] New Orleans", respectively. The subject petitions call for the City Charter to be amended to delete the

prohibition against a mayor serving more than two terms. The Charter presently specifies that, upon 10,000 registered voters petitioning the City Council to change the City's Charter, a referendum must be held upon the suggested change. The complaint reflects that plaintiffs are both classified Civil Service employees of the City of New Orleans, who have circulated and who wish to continue to circulate the subject petition, and, further, who have affixed the subject bumper stickers to city vehicles, and who desire to continue to do so. Plaintiffs claim that:

> first, the prohibited activities do not constitute "political activity" as defined by Article X, Section 10 of the Louisiana Constitution; and
>
> second, the prohibition of these activities unconstitutionally restricts their First Amendment right to free speech.

Arguing that they fear disciplinary action for violating the prohibition, plaintiffs ask for injunctive relief, damages and attorneys' fees.

Defendant Civil Service Commission of the City of New Orleans moved to dismiss for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6), and for lack of jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1). At the conclusion of the hearing, the Court denied the Rule 12(b)(1) motion and granted the 12(b)(6) motion for reasons orally assigned from the bench.

The Court has carefully considered the plaintiffs' motion to reconsider the dismissal, but finds it to be without merit. The Court takes this opportunity to expand upon its previously-presented reasons for granting the motion to dismiss.

I.

As noted at the hearing, the Court does not exist in a vacuum. The Court took judicial notice (and, indeed, plaintiffs state in their memorandum) that the bumper stickers refer to the present Mayor of the City of New Orleans, Ernest N. "Dutch" Morial, and that Mayor Morial is presently serving his second consecutive term in office. These are all matters of public record which could be unquestionably demonstrated from easily accessible sources of indisputable accuracy; *see, Joseph v. U.S. Civil Service Comm.*, 554 F.2d 1140, 1147 (D.C. Cir. 1977). They are facts of common knowledge, of which a court may take judicial notice in ruling on a motion to dismiss. *See, Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977). *See also, Neeld v. National Hockey League*, 594 F.2d 1297 (11th Cir. 1979); *Population Services International v. Wilson*, 398 F.Supp. 321 (S.D.N.Y. 1975), *aff'd sub nom; Carey v. Population Services International*, 431 U.S. 678 (1977). Although normally the Court must accept as true all of the allegations in a pleading when ruling on a motion to dismiss under Fed.R.Civ.Pro. 12(b)(6), the Court "...will not accept as true allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleadings". 5 Wright & Miller, Federal Practice and Procedure § 1363 at p. 659 (1969) and cases cited therein. Here the Court did not convert the motion to dismiss into one for summary judgment, but merely took proper judicial notice of adjudicative facts inherent in the complaint.

Although plaintiffs are correct in noting that Federal Rule of Evidence 201(d) provides for notice when a Court takes judicial notice of a fact on its own initiative, the rule

only provides for notice and an opportunity to be heard on the propriety of the notice upon request, which request can be made after the notice was taken. Plaintiffs have neither requested an opportunity to challenge the notice nor asserted that the noticed facts were not properly noticed facts.

The Court also accepted at face value the declaration by counsel for plaintiffs that the bumper stickers and the petition are tied together, and considered them accordingly. An examination of the pleadings and attachments clearly discloses additional relevant facts:

> —under the existing City Charter, an incumbent mayor, elected to two full consecutive terms may not succeed himself.
>
> —the petitions seek to initiate a referendum procedure to delete the prohibition against a two-term mayor succeeding himself.
>
> —plaintiffs have affixed in the past and wish to continue to affix to city vehicles in the future the two subject bumper stickers which refer to the incumbent Mayor Ernest N. "Dutch" Morial.

It requires no quantum leap of logic to conclude that the combined purposes of the bumper stickers and petitions is to clear the way for the incumbent mayor to attempt to succeed himself, by removing the present "two-term" limitation from the City Charter. While not necessary to the Court's decision, it is neither unreasonable nor far-fetched to conclude that plaintiffs wish to be able to advertise the City's affection for "Dutch" (and vice versa) while seeking to secure signatures on petitions addressed to incumbent elected City councilmen, exhorting them to

call an election to permit the City and its Mayor to reciprocally demonstrate the depths of their respective devotion by authorizing him to seek a third term.

It is impossible to realistically characterize these efforts as anything but political. There is no analogy to be fairly drawn between a bumper sticked declaring that "Pride Builds New Orleans" and those which announce the mutual affection alleged to exist between this City and its Mayor, affixed to the bumper of a City car, operated by a classified civil service City employee, while classified employees are seeking citizen signatures on a petition directed to elected City officials, demanding that they initiate a City electoral process in order to permit the incumbent mayor to succeed himself. This Court has no problem concluding that the subject activities are "political activity" reprobated by Article 10, Section 9 of the Louisiana Constitution of 1974.

Nor can the Court agree that the subject activities are within the exception found in the concluding sentence of Section 9(c) of Article 10. The language of the sentence is clear; it excepts from the definition of "political activity" the ... "support of issues involving ... constitutional amendments ..." The section does not state "city charter amendments", nor is it ambiguous.

Further the Court notes that the *activity* excluded from the reprobated sphere of politics is "support of issues". This does not mean, or include, active participation in a signature-seeking petition drive to compel an election to seek voter support for the right of an incumbent mayor to succeed himself.

In effect, it seems clear to this Court that the

"bumper sticker-petition" effort amounted to a campaign; the "one-two punch" was a dual effort to (1) awaken public sentiment for Mayor Morial by widely displaying the bumper stickers while (2) seeking signatures on a petition in favor of an election to permit the Mayor to succeed himself. It would be less than realistic to expect the effect of either (1) or (2), or both, to disappear upon the closing of the charter amendment referendum polls. Rather, should the election petition succeed, and should the resulting vote be in favor of amending the charter, the residual effect of the Dutch-City reciprocal display of affection would doubtless carry over into the actual political campaign.

II.

Board restrictions upon the political activity of federal and state civil service employees have been upheld. *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). These cases require that the Court, in First Amendment contexts, examine the "closeness of fit" between the governmental interests in protecting the integrity of its civil service, and the prohibition sought to be applied; this "means-end" relationship must be determined on a case-by-case basis.

> "The standard to be applied in any case is a function of the impairment of first amendment interests. As the burden comes closer to impairing core first amendment values, e.g. the right to hold particular political views, ... or impairs some given first amendment value more substantially ... the requisite closeness of fit of means and end increases accordingly".

Morial v. Judiciary Commission of State of Louisiana, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

Applying this "variable standard of scrutiny" to the case at hand produces no impairment of core First Amendment values. There is no Constitutional right on the part of a classified city employee to operate a city vehicle on which the "Dutch [Loves] New Orleans"/"New Orleans [Loves] Dutch" bumper stickers are displayed. And this is the only such act declared "not proper" by the Commission's directive. There is no attempt to prohibit private expression—i.e. a bumper sticker on an employee's personal car. Without deciding the propriety of any such display, the Court nevertheless finds that there is no federal constitutional right for a public employee to display upon a public vehicle a legend or device which supports a political candidate.

Nor can it be said that the Commission's prohibition against a classified city employee circulating the subject petition impairs core First Amendment values. It is clear that a classified employee may *sign* the petition, as the Commission directive clearly and specifically states, so long as the signature is not the product of coercion or intimidation. The prohibition against a classified employee circulating this kind of document bears a "close fit" to the ends sought to be achieved—including the elimination of any possible overbearing or overreaching by a superior upon a subordinate. As noted in *Letter Carriers, supra*:

> "A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that

> Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act on their own beliefs...It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs, it is not enough merely to forbid an employee to attempt to influence or coerce another...Perhaps Congress at some time will come to a different view of the realities of political life and government service; but that is its current view of the matter and we are not now in any position to dispute it. Nor, in our view, does the Constitution forbid it".

Letter Carriers, supra at 566-567.

This concern, countered by a like remedy, is equally valid in a state context. *Letter Carriers's* approving reference to a statute drawn in plain and understandable language which forbids "...initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office..." 413 U.S. at 556, is particularly apt here.

"Partisan" is not limited to the activities of political parties, as the Fifth Circuit noted in connection with the "non-partisan nature of the Dallas, [Tex.] city council elections", *Wachsman v. City of Dallas*, 704 F.2d 160 (5th Cir. 1983), but, rather, the activity is to be tested against the litmus of politics. Here, there can be no doubt that the petition was political in nature. The change sought in the New Orleans charter would redound to the benefit of only one

person, the incumbent mayor. Morial, alone, bears the current restriction preventing a mayor from seeking another consecutive term. If the petition succeeds, and the election carries, Morial becomes qualified to seek re-election. In effect, the petition arguably becomes a "nominating petition" of the nature barred by the *Letter Carriers* rule.

Nor can I find an analogy between the instant petition and the kind of "referenda and constitutional elections" referred to approvingly in *Wachsman.* This is simply not that kind of creature, for the "candidate orientation" of this effort is clear.

The prohibition in the Commission's directive is fair and reasonable; the means it applies fits well to the end sought to be achieved—that is, to "keep the employee from being involved in the politics that elects his boss". *Wachsman, supra* at 165.

The motion for rehearing is denied.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
July 20, 1983

APPENDIX "D"

STANFORD BARRE' and JOSEPH WOMBLE,

Plaintiffs-Appellants,

versus

THE CIVIL SERVICE COMMISSION
OF THE CITY OF NEW ORLEANS

Defendant-Appellee

NO. 83-3492

UNITED STATES COURT OF APPEAL,
FIFTH CIRCUIT

May 10, 1984

Before POLITZ, WILLIAMS and GARWOOD, Circuit Judges

PER CURIAM: AFFIRMED

APPENDIX "E"

STANFORD BARRE' and JOSEPH WOMBLE,

Plaintiffs-Appellants,

versus

THE CIVIL SERVICE COMMISSION
OF THE CITY OF NEW ORLEANS

Defendant-Appellee

NO. 83-3492

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

June 14, 1984

Before POLITZ, WILLIAMS and GARWOOD, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX "F"

UNITED STATES CONSTITUTION, FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX "G"

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "H"

TITLE 42 U.S.C. SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX "I"

FEDERAL RULES OF EVIDENCE, RULE 201

(a) Scope of rule

This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary

A court may take judicial notice, whether requested or not.

(d) When mandatory

A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice

Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury

In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

APPENDIX "J"

LOUISIANA CONSTITUTION
ARTICLE I, SECTION 7

No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.

APPENDIX "K"

LOUISIANA CONSTITUTION
ARTICLE X, SECTION 9 (C)

As used in this Part, "political activity" means an effort to support or oppose the election of a candidate for political office or to support a particular political party in an election. The support of issues involving bonded indebtedness, tax referenda, or constitutional amendments shall not be prohibited.

APPENDIX "L"

HOME RULE CHARTER OF THE CITY OF NEW ORLEANS, SECTION 4-201

The electors of the City shall elect a Mayor on the first Tuesday following the first Monday in April, 1954, and in every fourth year thereafter. He shall take office on the first Monday in May. The election shall be conducted in accordance with the general election laws of the State. No person who shall have been elected for two full consecutive terms as Mayor under this Charter shall be eligible to succeed himself.

APPENDIX "M"

PROPOSED AMENDMENT TO SECTION 4-201 OF THE HOME RULE CHARTER OF THE CITY OF NEW ORLEANS

The electors of the City shall elect a Mayor on the first Saturday in February 1982 and in every fourth year thereafter. He shall take office on the first Monday in May. The election shall be conducted in accordance with the general election laws of the State.

APPENDIX "N"

MEMORANDUM

TO: All City Departments, Agencies, Boards and Commissions.

FROM: The Civil Service Commission
City of New Orleans

The Civil Service Commission has been contacted by concerned parties with questions regarding fear of possible violation of Louisiana's Constitution which prohibits classified employees from becoming involved in activities of a partisan political nature. Article X, Section 9 of the Louisiana Constitution provides as follows:

Section 9. Prohibitions Against Political Activities

> Section 9. (A) Party Membership; Elections. No members of a civil service commission and no officer or employee in the classified service shall participate or engage in political activity; be a candidate for nomination or election to public office except to seek election as the classified state employee serving on the State Civil Service Commission; or be a member of any national, state, or local committee of a political party or faction; make or solicit contributions for any political party, faction, or candidate; or take active part in the management of the affairs of a political party, faction, candidate, or any political campaign, except to exercise his right as a citizen to express his opinion privately, to serve as a commissioner or official watcher at the polls, and to cast his vote as he desires.

(B) Contributions. No person shall solicit contributions for political purposes from any classified employee or official or use or attempt to use his position in the state or city service to punish or coerce the political action of a classified employee.

(C) Political Activity Defined. As used in this Part, "political activity" means an effort to support or oppose the election of a candidate for political office or to support a particular political party in an election. The support of issues involving bonded indebtedness, tax referenda, or constitutional amendments shall not be prohibited

Specifically, the Commission has been asked the following:

1. Whether classified employees may sign a petition supporting a change in the City Charter which would remove the prohibition on a Mayor serving more than two consecutive terms?

2. Whether classified employees may circulate said petition and seek signatures from others?

3. Whether classified employees may be allowed to operate City vehicles or equipment which bear bumper stickers, emblems, or other insignia of a political nature?

After considering these questions it is the opinion of the Commission that:

1. A classified employee *may sign* the petition in question supporting a change in the City Charter. However, no classified employee may be coerced or intimidated into signing the petition nor in any way threatened should they choose not to sign said petition.

2. Circulating the petition supporting the proposed charter change and/or soliciting signatures for the petition *may not* be done by classified employees since to do so may constitute a violation of Article X, Section 10 of the Louisiana Constitution.

3. It is not proper for classified City employees to operate any City vehicle which bears political insignia or political bumper stickers of any kind.

It is requested that this information be brought to the attention of all City employees, classified and unclassified, so that possible violations of the Constitution may be avoided.

Please post this announcement in a conspicuous spot so that all employees may take note of it.

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

LEON J. REYMOND, JR.
CHAIRMAN

May 3, 1983.

APPENDIX "O"

June 13, 1983.

Councilman-At-Large
Joseph I. Giarrusso
Room 2EO9 City Hall
New Orleans, Louisiana 70112

Dear Councilman Giarrusso:

The Commission has asked me to respond to your letter dated June 8, 1983, concerning your efforts toward having a referendum called to return the rate-making regulatory authority to the New Orleans City Council from the Public Service Commission.

You requested advice as to whether a classified employee would be in violation of the provisions of Civil Service Rules, Law and the provisions of the Louisiana State Constitution, which prohibit classified employees from taking a public stand in issues which are of a political nature, if they affixed a bumper sticker to their private motor vehicle or drove a public motor vehicle with a bumper sticker reading "Get NOPSI Back".

Since, at the present time, such a referendum has no apparent political overtones and is not connected to any individual's specific political election or re-election campaign, the provisions of the Louisiana State Constitution, Article X, Section 9 (c) would appear to control. This section reads:

> "(c) Political activity defined. As used in this Part, "political activity" means an effort to support or oppose the election of a candidate for

political office or to support a particular political party in an election. The support of issues involving bonded indebtedness, tax referenda, or constitutional amendments shall not be prohibited."

As long as this issue remains separate and apart from an individual's or group's partisan political campaign, it would appear to fall within the ambit of the Louisiana Constitution quoted above.

Very truly yours,

JOHN A. BELSOM
Director of Personnel

JAB:kmw

Copies to:
The Civil Service Commission
Mr. Ralph D. Dwyer, Jr.

APPENDIX "P"

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF ORLEANS

BE IT KNOWN, That on this 23rd day of June in the year of Our Lord one thousand nine hundred and eighty-three.

BEFORE ME, Bruce C. Waltzer, a Notary Public, duly commissioned and qualified, in and for the Parish of Orleans, State of Louisiana, therein residing, and in the presence of the witnesses hereinafter named and undersigned:

PERSONALLY CAME AND APPEARED, Ernest N. Morial, Mayor, City of New Orleans, who did depose and state as follows:

Affiant has not decided at this point in time to run for the Office of Mayor in 1986. In fact, affiant is presently prohibited by law from running for the Office of Mayor. Such a decision, therefore, would be a vain and fruitless act.

There are many factors which would determine whether affiant would be a candidate for a third term. Most of the factors which would have to be weighed and analyze are not under affiant's direct influence or control, such as the outcome of certain statewide and national elections and the petition referendum which is the subject of this Honorable Court's consideration.

All variables which have a direct bearing on affiant's future career would have to be meticulously scrutinized

and painstakingly analyze. This deliberate and careful review process is dictated by the magnitude of the decision involved.

Moreover, affiant avers that it would be foolhardy on his part to make a decision which is impossible to implement. Presently, the Home Rule Charter of the City of New Orleans specifically prohibits affiant from running for another term of office. Consequently, affiant is denied the ability to offer his candidacy to the citizenry. It would be a vain and fruitless act for affiant to decide to do that which the law precludes him from doing.

Affiant readily acknowledges that he has publicly stated that he would seriously consider becoming a candidate for the Office of Mayor of the City of New Orleans when able to formally qualify for that office if he were legally eligible to do so at that time. There is, however, a world of difference between considering an option and deciding upon one. Affiant contends that federal jurisprudential law holds that an individual is not a "candidate for elective office" even where he has formed an intention to become a candidate but has made no public announcement of candidacy and has neither filed nor circulated nominating petitions. *Simmons v. Stanton,* 502 F.Supp. 932 (W.D. Mich. 1980). Affiant maintains that if "forming the intent to run" does not make one a candidate, then considering the option to run, certainly can not make one a candidate.

The above and foregoing information contained herein is true and correct to the best of by knowledge and belief.

/S/ Signed

AFFIANT

WITNESSES:

/S/ Signed

/S/ Signed

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 27
DAY OF JUNE, 1983

/S/ Signed
NOTARY PUBLIC